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No. 82-1076

In the Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF LOUISIANA, ET AL., PETITIONERS

v.

DEPARTMENT OF ENERGY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

BRIEF FOR THE RESPONDENTS IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

NANCY C. CRISMAN
Assistant General Counsel

JUDITH A. MATHER
MARCIA K. SOWLES
Attorneys

Department of Energy
Washington, D.C. 20585

QUESTION PRESENTED

Whether the Temporary Emergency Court of Appeals correctly upheld the Department of Energy's interpretation of its own regulation defining the term "property" for purposes of the federal crude oil price control regulations, under which multiple reservoir-wide crude oil production units established by the Louisiana Office of Conservation within the confines of a single fee or leased premises were not automatically entitled to treatment as separate "properties."

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 690 F.2d 180. The opinions of the district court denying respondents' motions to dismiss the complaints (Pet. App. 23a-44a) and granting summary judgment for petitioners (Pet. App. 45a-50a) are reported at 507 F. Supp. 1365 and 519 F. Supp. 351.

JURISDICTION

The judgment of the court of appeals (Pet. App. 21a) was entered on October 4, 1982. A petition for rehearing was denied on November 26, 1982 (Pet.

App. 22a). The petition for a writ of certiorari was filed on December 23, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 211(g) of the Economic Stabilization Act of 1970, 12 U.S.C. 1904 note.

STATEMENT

1. *The Regulatory Background*

a. Under the authority of the Economic Stabilization Act of 1970 ("ESA"), 12 U.S.C. 1904 note, the Cost of Living Council ("CLC"), on August 17, 1973, issued its Phase IV system of price controls for domestic crude oil production (6 C.F.R. Part 150 subpart L (1974); 38 Fed. Reg. 22538). The Phase IV controls were structured as a two-tier pricing system (6 C.F.R. 150.354 (1974)), which was designed to accomplish the dual objectives of halting the inflationary spiral in crude oil prices while attempting to limit the extent to which price controls would cause disincentives to possible future increases in domestic production.

Central to the two-tier system was the concept of "property." Generally, if in a given month an operator produced and sold *from a property* no more than the amount of crude oil that it produced and sold in the same month in 1972, the price for such production could not exceed the controlled price for "old oil." Any production from the property in excess of the 1972 base period production level was deemed "new oil" and could be sold at prices above the controlled price.

As originally promulgated by the CLC, "property" was defined as

> [t]he right which arises from a lease or from a fee interest to produce domestic crude petroleum.

38 Fed. Reg. 22538 (1973). Thus, in order to determine what constituted a particular property for the purpose of calculating lawful prices, the definition required that the producer focus on the "right * * * to produce" crude oil "which arises from a lease or from a fee interest." See *Grigsby* v. *DOE*, 585 F.2d 1069, modified on reh'g 585 F.2d 1080, 1083 (Temp. Emer. Ct. App. 1978), cert. denied, 440 U.S. 908 (1979).

b. Because of the possibility that changes in ownership and a restructuring of the right to produce crude oil might have occurred since the promulgation of the property definition in 1973, the Department of Energy ("DOE"),[1] on August 29, 1975, issued Interpretative Ruling 1975-15. 40 Fed. Reg. 40832. The Ruling discussed a number of different issues concerning the property definition, including the treatment of multiple reservoirs within a single property. It stated (*id.* at 40833):

> Because the property concept is based upon the right to produce crude oil, whether arising from a lease or from a fee interest, the existence of two or more separate and distinct reservoirs will not in itself create two or more separate "properties." Therefore * * * where a producer holds a single right to produce crude oil from two or more reservoirs, together the two or more reservoirs constitute a single property; where there are separarate and distinct rights to produce crude oil from each reservoir, each reservoir accordingly represents a different property.

Under this approach, an accident of geology, such as the presence of more than one reservoir under a sin-

[1] As used herein, "DOE" includes the Department of Energy, the Secretary of Energy, and predecessor agencies of the DOE, including the Federal Energy Administration.

gle property, did not affect the operator's right to produce and therefore could not provide, by itself, a basis for separate property treatment.

The Ruling also addressed the role of state law in interpreting federal regulations, and pointed out that, while

> various state and other federal regulatory authorities may, for other purposes, have monitored production levels on other bases (*e.g.*, by physical boundaries or by producing formations or reservoirs), it is necessary that the price regulations embody a uniform concept, the parameters of which can be readily applied to all domestic production, regardless of varying state classifications. For this reason, FEA regulations utilized, as a reference, a property concept, based upon the right to produce crude oil, that can be readily identified for all producers.

40 Fed. Reg. at 40832.

c. On December 22, 1975, Congress enacted the Energy Policy and Conservation Act ("EPCA"), Pub. L. No. 94-163, 89 Stat. 871 *et seq.* By this time, the condition of the nation's oil supplies had changed drastically as a result of the Middle East oil embargo and resulting shortages. In response to this situation, EPCA required the establishment of a new crude oil pricing policy. Specifically, Section 401 of EPCA, 89 Stat. 941, changed the regulatory focus that had existed under the ESA and mandated the promulgation of new regulations designed to obtain the optimum production of crude oil in the United States.

On August 20, 1976, after notice and comment and as part of the rulemaking implementing EPCA, the Federal Energy Administration ("FEA") issued a final rule amending the property definition by adding to the basic "right to produce" concept of the original

rule the alternative option, effective after September 1, 1976, of treating as separate "properties" separate reservoirs recognized as distinct producing units by the appropriate governmental regulatory body. 41 Fed. Reg. 36172 (1976). The FEA explained that, given the new priorities and mandate of EPCA, the incentives under the two-tier system would now arguably be maximized under the new reservoir-by-reservoir approach. *Id.* at 36178.[2]

2. ***The Proceedings Below***

a. On May 1, 1979, DOE, acting pursuant to 10 C.F.R. 205.193 (1978), issued a Proposed Remedial Order ("PRO") with respect to petitioner Texaco Inc. ("Texaco"). The PRO alleged that during the period from September 1973 through March 1979, Texaco sold crude oil it produced in Louisiana, Texas, New Mexico, Wyoming and the Outer Continental Shelf at prices in excess of the maximum lawful prices. Texaco's violations, the PRO alleged, were the result of numerous unlawful pricing practices, including the treatment of reservoir-wide Louisiana Office of Conservation ("LOC") units as separate properties under the 1973 property regulation. The PRO alleged that Texaco had overcharged purchasers of crude oil by $748 million, and sought refunds of that amount plus interest.

Texaco, as well as petitioners Louisiana and the Louisiana Land and Exploration Company ("LL&E"), filed Notices of Objection to the PRO and adjudicatory proceedings then commenced before the DOE's Office

[2] The preamble to the August 20 rulemaking was reissued as Ruling 1977-1. 42 Fed. Reg. 3628 (1977). Subsequently, FEA issued Ruling 1977-2 (42 Fed. Reg. 4409 (1977)), which reaffirmed Ruling 1977-1 and added a few clarifications not relevant here.

of Hearings and Appeals ("OHA"). See 10 C.F.R. 205.193 (1978). The OHA proceeding is still pending.

b. In May 1980, the State of Louisiana brought this action for declaratory and injunctive relief in the United States District Court for the Western District of Louisiana, challenging DOE's interpretation of the definition of property in the 1973 regulation.[3] Texaco and LL&E intervened as of right.

On July 7, 1981, the district court granted summary judgment for petitioners (Pet. App. 45a-50a). In its decision, the district court (*id.* at 46a) incorporated the findings and conclusions set forth in its earlier decision denying DOE's motions to dismiss the complaints (*id.* at 23a-44a). The court found (*id.* at 43a, 49a) that a statement in the preamble to the 1976 amendment to the property regulation, which declared that the amendment was intended to allow separate reservoirs to be treated prospectively as separate properties, while previously this was possible only if each of the separate reservoirs was also subject to a separate "right to produce," was a new interpretation of the original 1973 regulation.[4] The district court found that this interpretation, although "rea-

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[3] In July 1979, two months after issuance of the Texaco PRO, Texaco filed suit against the DOE in the United States District Court for the District of Delaware, asserting virtually the same claims as were later presented to and decided by the district court in this case. Louisiana and LL&E were granted leave to intervene in Texaco's action. The Delaware court subsequently dismissed the suits as to Texaco and LL&E. See *Texaco Inc.* v. *DOE*, 490 F. Supp. 874 (D. Del. 1980). Louisiana then voluntarily dismissed its action in Delaware and refiled in Louisiana.

[4] In fact, the agency, in Ruling 1975-15, had stated earlier that separate reservoirs did not automatically qualify as separate properties. 40 Fed. Reg. 40832 (1975).

sonable," was not "compelled," and it concluded that because petitioners offered an "equally reasonable" interpretation of the original property regulation, petitioners' interpretation should prevail (*id.* at 48a-49a). Accordingly, the court refused to defer to the agency's interpretation of its own regulation and instead upheld petitioners' interpretation that all reservoir-wide LOC units within a single lease or fee were *per se* separate properties under the 1973 regulation (*id.* at 49a). The court thereupon enjoined DOE from proceeding administratively against petitioners on the basis of an interpretation of the property definition that conflicts with petitioners' interpretation (*ibid.*).

c. The Temporary Emergency Court of Appeals ("TECA") reversed the district court's grant of summary judgment for petitioners (Pet. App. 1a-20a). After a thorough review of the language and purpose of the "property" definition and the agency's interpretations of that definition, the court of appeals held that DOE's interpretation of its own regulation was reasonable and consistent with the two-tier pricing system under the ESA (*id.* at 14a-17a). The court concluded (*id.* at 20a) that

> [petitioners] knew that they were using a different interpretation in determining whether the oil being produced was old or new. They never sought an agency interpretation to sustain their position. Rather, they seem to have proceeded on the theory that their interpretation was reasonable and that it would afford them protection against such a claim as now being made by DOE. This, of course, is no defense. The history of the regulations, rulings and interpretations demonstrates that there was no justification for their position.

ARGUMENT

The court of appeals correctly affirmed the DOE's reasonable and consistent interpretation of the 1973 "property" regulation to the effect that state recognized separate reservoirs do not, in themselves, constitute separate properties unless a specific reservoir corresponds with a single "right to produce." The question presented is unlikely to recur because crude oil prices were decontrolled more than two years ago.[5] Contrary to petitioners' contention, TECA correctly

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[5] Petitioners argue (Pet. 17) that this case has significance for the future because the effect of the windfall profit tax depends in part on the meaning of the definition of "property" under the June 1979 energy regulations. 26 U.S.C. (Supp. V) 4991. The narrow issue presented here, however, does not focus on the meaning of the June 1979 energy regulations. Rather, the issue is whether, prior to the August 1976 amendment to the property regulation, each reservoir-wide LOC unit within a lease was entitled to be treated as a separate property *per se*.

Moreover, the Secretary of the Treasury has full authority to reinterpret or change the application of DOE regulations for tax administration purposes:

> The Secretary shall prescribe such regulations as may be necessary or appropriate to carry out the purposes of this chapter, including such changes in the application of the energy regulations for purposes of this chapter as may be necessary or appropriate to carry out such purposes.

26 U.S.C. (Supp. V) 4997(b). With regard to the property definition, the Internal Revenue Service has not yet issued its final regulations on the treatment of separate reservoirs within a lease. 47 Fed. Reg. 50858 (1982). Indeed, the IRS has invited comments on "whether [Rulings 1977-1 and 1977-2] should be modified for purposes of the windfall profit tax." 47 Fed. Reg. at 50924. Accordingly, any impact this decision may have for tax purposes is entirely speculative.

concluded that its decision in this case is consistent with its other decisions concerning the proper interpretation of the 1973 "property" regulation in other contexts. This conclusion is entitled to be accorded considerable weight, since, as this Court has recently recognized, Congress established the TECA specifically to ensure expert and uniform treatment of issues such as the one decided here. See *Tully* v. *Mobil Oil Corp.*, 455 U.S. 245, 248 (1982).

In addition, petitioners are incorrect in suggesting (Pet. 16) that this case will result in the assessment of billions of dollars for alleged regulatory violations in other cases. Only a limited number of those actions involve allegations of overpricing as the result of treating reservoir-wide LOC units within a single lease as separate properties. Indeed, even as to the pending enforcement action against petitioner Texaco, only a portion of the total alleged overcharge results from Texaco's incorrect property treatment of reservoir-wide LOC units.[6] Hence, further review by this Court is not warranted.

1. Petitioners contend (Pet. 18-22) that the decision below is inconsistent with the TECA's decisions in *Grigsby* v. *DOE*, *supra*, and *Pennzoil Co.* v. *DOE*, 680 F.2d 156 (1982), and that the court "made no effort to reconcile its decision" here with those earlier decisions (Pet. 22). In fact, however, the TECA discussed the *Grigsby* and *Pennzoil* deci-

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[6] Furthermore, although DOE has not sought review of the court of appeals' rulings as to exhaustion of administrative remedies and the ripeness of petitioners' claims (see Pet. App. 8a-11a), it is noteworthy that the administrative proceeding against Texaco is still in the initial stages and there is no certainty that Texaco will be found liable in that proceeding.

sions at length (Pet. App. 17a-18a) and specifically found "no inconsistency in our determination in this case with the holding in *Grigsby* or *Pennzoil* * * *" (*id.* at 18a). Neither *Grigsby* nor *Pennzoil* addressed the issue presented here, *viz.*, whether multiple reservoir-wide LOC units within a single lease qualify as separate "properties" *per se* under the 1973 "property" definition. Rather, as the decision below specifically states (Pet. App. 17a), *Grigsby* and *Pennzoil* "addressed an entirely different question," *viz.*, whether aggregation of several leases into a single production unit ("unitization") constitutes a single "property."

In *Grigsby*, as here, the TECA noted that under the regulation at issue a "property" was "generally synonymous with the tract or premises as to which a right to produce exists pursuant to an oil or gas lease." 585 F.2d at 1083 n.k. The TECA recognized, however, that the agency had never stated that "property" was always defined by the lease. *Ibid.*[7] The

[7] Petitioners suggest (Pet. 19-21) that the TECA deviated in this case from its past "property" decisions in that it changed the focus of the property definition from the "right to produce" to the lease or fee interest. To the contrary, the TECA merely reconfirmed its statements in *Grigsby*, approving the agency's interpretation in Ruling 1977-1, that in most cases the "right to produce" proves to be synonymous with the lease or fee interest, and the premises described in the lease or fee instrument thus describe the property "in the vast majority of instances" (Pet. App. 15a). The court in this case applied this analysis in upholding the agency's position that, "[s]ince the 'right to produce' was the proper basis for making property designations, geological considerations such as reservoir boundaries were irrelevant" (*id.* at 5a). The decision below thus continues, and does not depart from, the TECA's past decisions focusing on the "right to produce" in interpreting the original property regulation.

court found that where mineral fees or leasehold interests were aggregated through unitization, it was the unitized premises that defined the property. Because each of the two LOC unit orders at issue in *Grigsby* aggregated several leasehold premises into a single drilling unit and allocated production from each unitized premises to the various interests comprising the unit on a surface acreage basis, the TECA found that each of the unit orders created a separate right to produce. The court's conclusion in *Grigsby* was not based on the mere existence of a LOC unit order, as petitioners suggest, but rather on an analysis of the specific terms of the particular LOC unit orders aggregating several "rights to produce" into a single entity.[8] Thus, there is no inconsistency between the *Grigsby* holding that a state order aggregating several "rights to produce" establishes a single "right to produce," and the holding below that a state order recognizing the geological fact of separate reservoirs within a single "right to produce" does not as a matter of law establish several new "rights to produce."[9]

Pennzoil, like *Grigsby*, focused solely on the treatment of units created by the aggregation of several leases. In that case, the TECA upheld that portion of Ruling 1975-15 which provided that if several individual leases were aggregated through a unitization, the resulting unit defined the "right to produce,"

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[8] The Louisiana Office of Conservation issues unit orders for many types of units, including various types of reservoir-wide and non-reservoir-wide units, which may be formed voluntarily by producers or compelled by the State.

[9] The TECA's recent decision in *Grigsby* v. *DOE*, No. 5-81 (Jan. 18, 1983), cited by petitioners in their supplemental brief, merely reaffirms its prior decision and thus is no more helpful to petitioners' position than the court's initial decision in *Grigsby*.

and the property consisted of the unitized premises. The court indicated that it was not addressing the application of the property regulation in other contexts (680 F.2d at 168-169), and expressly reserved the issue presented here (which was addressed in a different portion of Ruling 1975-15) concerning the appropriate treatment of reservoir-wide production units within a single lease. 680 F.2d at 178-179 n.42.

In sum, rather than reflecting conflicting interpretations of the property definition, as petitioners maintain, the TECA's decisions in *Grigsby*, *Pennzoil* and this case merely confirm the differences, recognized by the DOE in Ruling 1975-15, between the aggregation of leases to form a unit and segregation of a portion of a single lease.

2. Petitioners contend (Pet. 23) that the TECA denied them "their right to meaningful judicial review" because it "deferred, without analysis," to the agency's interpretation of the property regulation "on the sole ground that it found that position to be 'reasonable.'" Petitioners insist that the court neglected to consider such factors as the consistency of the interpretation with prior agency interpretations and the district court's finding that the treatment of reservoir-wide LOC units as "properties" was consistent with the objectives of price controls.

This contention mischaracterizes not only the proper standard of review for an agency's interpretation of its own regulation but also the TECA's actual analysis in this case. As this Court has repeatedly emphasized, in order to sustain an agency's interpretation of a statute the agency is charged with administering, the reviewing court "need not find that [the agency's] construction is the only reasonable one, or even that it is the result [the court] would have reached had the question arisen in the first instance

in a judicial proceeding." *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965), quoting *Unemployment Commission* v. *Aragon*, 329 U.S. 143, 153 (1946). See, *e.g.*, *Zenith Radio Corp.* v. *United States*, 437 U.S. 443, 450 (1978). Where, as here, "the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order." *Udall* v. *Tallman*, *supra*, 380 U.S. at 16. See, *e.g.*, *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 566 (1980).[10] Thus, an agency's interpretation of its own regulation is given "controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Udall* v. *Tallman*, *supra*, 380 U.S. at 16-17, quoting *Bowles* v. *Seminole Rock Co.*, 325 U.S. 410, 413-414 (1945).

That is precisely the test applied by the TECA in this case (see Pet. App. 14a-17a). After examining the purpose of the two-tier pricing system and the language of the regulation, the court found the agency's interpretation to be reasonable and consistent with the pricing system's underlying policies (*id.* at 16a-17a). The court recognized that in establishing the price control program for crude oil in 1973, the DOE was required "to 'strike a balance' between the policy of restraining price increases and that of stimulating increased domestic production of crude oil" (*id.* at 14a). The agency's interpretation of the 1973

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[10] Petitioners completely ignore this special deference accorded an agency's interpretation of its own regulation. The cases they cite focus not on an agency's interpretation of its own regulation, but on its interpretation of a statute. See, *e.g.*, *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944) (rulings interpreting the Fair Labor Standards Act); *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976) (guidelines interpreting Title VII of the Civil Rights Act of 1964).

property regulation sought "to reconcile these 'sometimes conflicting needs' " (*id.* at 15a). In light of this background, the TECA found that an interpretation of the regulation focusing on the "right to produce," and not on state recognition of geological facts such as reservoir boundaries, was one rational means of striking the balance (*ibid.*).

In contrast, the 1976 property regulation was promulgated pursuant to EPCA, which "mandated revisions in the price control program to optimize domestic production" (Pet. App. 16a). Responding to this new mandate, the agency amended the property definition prospectively to provide the option of treating state recognized separate reservoirs as separate properties. Generally, depending on individual production patterns, treating each state recognized reservoir within a single lease or fee as a separate property would increase the proportion of new oil that the lease produces. In turn, new oil sold at higher prices would provide the needed incentive for increased production. As the court of appeals stated (*ibid.*):

> FEA explicitly found that the amendment to the property definition would offer the industry greater incentive to increase exploration and production and thus determined that the amendment would further the policy enunciated by Congress.

Thus, the 1973 property regulation and the 1976 regulation were promulgated pursuant to different statutory mandates and the court below found reasonable the agency's choice of options in responding to the varying policies of Congress.

The TECA correctly ignored the district court's finding that petitioners' interpretation also was reasonable. As this Court has consistently recognized, the alleged reasonableness of a contrary interpreta-

tion makes no difference. See *Bayside Enterprises, Inc.* v. *NLRB*, 429 U.S. 298, 303-304 (1977).[11]

Contrary to petitioners' assertion (Pet. 24), the TECA specifically found the agency's position to be consistent. The TECA recognized (Pet. App. 18a-19a) that Ruling 1975-15 specifically addressed the issue presented here—state recognition of multiple reservoirs within a single lease or fee, and the court noted (*id.* at 15a) that both the Notice of Rulemaking issued August 20, 1976, and Ruling 1977-1 reiterated the position expressed by DOE in Ruling 1975-15 that separate reservoirs would not be considered as separate properties *per se*. The court concluded (Pet. App. 15a-16a; citations omitted):[12]

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[11] The cases cited by petitioners do not suggest the contrary. Indeed, in *Pennzoil* v. *DOE*, *supra*, 680 F.2d at 174, the TECA observed that

> to deny deference in accepting the agency's interpretation simply because another interpretation, strained or not, was indulged in by an operator out of self interest, would substitute for the rule of deference to an agency action a rule of deference to that of a producer.

The only support petitioners offer for a less deferential standard of review (Pet. 25-26) is a proposed amendment to the Administrative Procedure Act, 5 U.S.C. 706(c), which would change the existing standard. This legislative proposal, however, has not yet been enacted into law.

[12] The only evidence offered by petitioners to show administrative confusion (Pet. 6, 15) is an ambiguous statement by then FEA Deputy Administrator John Hill to Congress as to the supposed vagueness of the property regulations. Petitioners' reliance on this statement is misplaced. Because the property regulation is applied to many types of premises, including those containing only one reservoir, the precise context to which Mr. Hill's statement was meant to refer is unclear. However, since the agency previously had fully ex-

> The agency has been consistent in this interpretation even though during 1976 it indicated the possibility that it might change its mind and adopt the definition contended for by [petitioners]. * * * After considering the comments received and giving the matter further thought, the agency rejected the proposals. * * * The amended regulations were adopted effective September 1, 1976. They continued the prior definition of property up to September 1976 but changed the definition for the future. This was not an admission that the original definition and its interpretation were wrong or vague. It merely signified the determination of the agency that in the

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plained its position, in Ruling 1975-15, with regard to the treatment under the original regulation of two or more reservoirs subject to the same right to produce, it is unlikely that separate reservoir treatment was the focus of his statement. In any event, unexplained statements to Congress by agency officials are not entitled to be accorded authoritative weight by the courts. See, *e.g.*, *United States* v. *Stewart*, 311 U.S. 60, 70 n.22 (1940).

Petitioners also assert (Pet. 23) that the recognition of separate reservoirs "by the official act of a sovereign state" somehow gives petitioners' reservoirs a special status vis-a-vis the federal property regulation and that the TECA should have considered this fact. The TECA recognized that the state status of these reservoirs was merely an option that the DOE "might * * * have chosen" (Pet. App. 15a) for purposes of the federal regulatory program. State law and regulations are relevant and have applicability with respect to federal regulations only when the federal agency has affirmatively chosen to have such state law or regulations apply. See *Rice* v. *Board of Trade*, 331 U.S. 247, 253 (1947); *Bethlehem Steel Co.* v. *New York Labor Relations Board*, 330 U.S. 767, 773 (1947). Here, the federal agency decided not to rely on the state classifications but rather to adopt a uniform federal rule.

future the LOC unit designation would better achieve the goal of the pricing system to find new oil.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

NANCY C. CRISMAN
Assistant General Counsel

JUDITH A. MATHER
MARCIA K. SOWLES
Attorneys
Department of Energy

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